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1 [The R.M.C. 803 session was called to order at 1402, 13 August  
2 2014.]

3 MJ [COL POHL]: The commission is called to order.

4 Trial Counsel, are the same parties present for the  
5 government that were present yesterday -- on Monday?

6 CP [BG MARTINS]: Your Honor, Ms. Danielle Tarin is no  
7 longer at counsel table, but other than that, everyone else is  
8 the same. And I should announce at this point the proceedings  
9 are being transmitted by closed-circuit television to  
10 locations in the United States.

11 MJ [COL POHL]: Mr. Harrington, the same?

12 LDC [MR. HARRINGTON]: Everyone is the same, Judge.

13 MJ [COL POHL]: Given the posture of this case,  
14 procedurally this is how we are going to go. On Monday the  
15 government started with their argument based on their  
16 pleading. The defense had a chance to respond with the  
17 understanding they hadn't filed a pleading yet. The  
18 government responded back to them.

19 Since that time, the defense has filed their response  
20 to the government motion. We are going to pick up the  
21 argument with the defense at this point. Government, you will  
22 have an opportunity to have a rebuttal to the defense, and,  
23 Defense, you will have one more chance if you want to. So it

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1 will be basically two opportunities going through, but the  
2 government has already had their first full opportunity.

3 That being said, Mr. Harrington, do you wish to add  
4 anything to your brief?

5 LDC [MR. HARRINGTON]: Judge, the only thing that I want  
6 to add to my comments from the other day, and this is  
7 reflected in our brief, is the intertwining of the 152 motion  
8 that we have filed, which deals with noises and vibrations and  
9 the conditions in the camp with respect to Mr. Binalshibh.  
10 And the timing of the 706 is directly related to the 152. We  
11 filed a 152 within a day the 706 hearing request was filed,  
12 and then since then that's been shut down, and the number of  
13 times we have been back here, we have brought to the court's  
14 attention the continuing problem.

15 The prosecution denies that anything is happening,  
16 and that's a recurring problem, but it directly affects the  
17 conduct of Mr. Binalshibh in the courtroom where he has been  
18 put out of the courtroom, and it reflects other things.

19 Mr. Binalshibh wishes that that issue would go away,  
20 but it appears that it's going to be a lingering problem  
21 throughout these proceedings unless something happens one way  
22 or the other. And we brought that up because we believe that  
23 Mr. Binalshibh would be better able to address that issue

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1 directly with the court if he were alone than with other  
2 counsel.

3           The court obviously has to consider all five of the  
4 accused and the rights of all five of the accused. You have a  
5 big backlog of motions to be argued that are reflected on the  
6 docket sheet here and other motions that have to be argued,  
7 and the relief with respect to 152 keeps getting subsumed into  
8 other things.

9           I am not criticizing anybody for that, it's just the  
10 nature of things. So that's one of the factors that went into  
11 this and with the agreement of Mr. Binalshibh to -- for the  
12 consent of the court's order, not that he has a right to  
13 consent or not consent, but he is affirmatively asking for  
14 severance at this point, and we also ----

15       MJ [COL POHL]: Just to make it clear, Mr. Harrington, the  
16 issue that's before me is there was a court-ordered severance.  
17 There has never been a request for severance with a basis for  
18 it from you or any of the others except for Mr. Hawsawi. So I  
19 just want to make sure, that I see those as two kind of  
20 completely separate issues. It ended up with the same relief,  
21 but the basis for the original order may be different than the  
22 basis if you wish to request severance. Okay. Go ahead.

23       LDC [MR. HARRINGTON]: I understand that, Judge, but you

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1 directly put the question to me the other day of what our  
2 position was on this ----

3 MJ [COL POHL]: True.

4 LDC [MR. HARRINGTON]: ---- and I just want the court to  
5 know that that is our position.

6 We also emphasize, Judge -- and I'm not going into  
7 details on 292, but the 292 issue is not an easy issue to  
8 resolve. I know the special trial team or special prosecution  
9 team thinks that it is and has a very narrow view of what  
10 needs to happen. But, for example, yesterday when I met with  
11 Mr. Binalshibh, we discussed what the conflict counsel might  
12 have to do, and he asked me if I could prepare for him what I  
13 would do if I was appointed as a conflict counsel. And I gave  
14 him today a very long list of things that need to be done in  
15 order to adequately advise him. And it's not easy, it's  
16 not -- and it's complicated, and it's also hampered by the  
17 fact that we have to have security-cleared counsel and the  
18 practicalities of coming down here to visit.

19 But it's also hampered, Judge, by the fact that his  
20 regular defense team and his conflict counsel team as of now  
21 does not know what the full nature of the investigation was by  
22 the FBI and by the special prosecutor. And until that, nobody  
23 is in a position, not we as his lawyers, to ethically advise

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1 him of what we perceive to be the problem, if any, and make a  
2 commitment to him that if there is any problem, that that  
3 would not interfere with our relationship with him, our  
4 ability to defend him. And the same thing with the conflict  
5 counsel, they are going to have to have that.

6           So if we don't have that disclosure, and the conflict  
7 counsel doesn't have the disclosure -- and it would appear  
8 there is going to be certainly some argument about that or  
9 some fight about it -- it's going to extend the resolution of  
10 this issue. And I think that the prosecution is overly  
11 optimistic that this can be done in a matter of several  
12 months.

13       MJ [COL POHL]: Mr. Harrington, in any event, as far as  
14 Mr. Binalshibh is concerned, it's going to take, in your view,  
15 on the 292 issue, a while to resolve?

16       LDC [MR. HARRINGTON]: Correct.

17       MJ [COL POHL]: Correct. Okay.

18       LDC [MR. HARRINGTON]: And that is obviously an impediment  
19 on us going forward, really, on anything.

20           And, Judge, just to go back to what you said before,  
21 that this was your decision and it's not a motion by the  
22 defense for a severance, although we indicate to you that we  
23 do agree with the court's decision, fundamentally it's our

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1 position that this court made a decision that the arguments  
2 that the government raised in asking for reconsideration,  
3 which go to the merits, if you will, of whether a severance  
4 should be granted or not, are all things that you considered  
5 and are reflected in your decision, and they are just unhappy  
6 with the result and now they come back and try to say that  
7 because you decided in a way differently than theirs, that  
8 they should be able to do this.

9           It's our position that they don't even meet the  
10 threshold of being able to have a reconsideration, that your  
11 order should stand, and we believe that -- as I mentioned  
12 before, with 152 and Mr. Binalshibh's complaints about the  
13 conditions at the camp, that that supports the reasoning in  
14 your decision, even though you may not have mentioned that in  
15 your decision. And obviously we didn't file a motion for a  
16 severance, but we agree that severance is appropriate and we  
17 are asking the court not to vacate your order.

18       MJ [COL POHL]: Thank you, Mr. Harrington.

19           Trial Counsel?

20       MDTC [MR. TRIVETT]: Good afternoon, Your Honor.

21       MJ [COL POHL]: Good afternoon.

22       MDTC [MR. TRIVETT]: We received the defense response this  
23 morning, and a lot of my oral argument will be responding to

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1 their arguments, not only raised in oral argument, but  
2 obviously raised in that response as well. We have waived our  
3 right to reply. We want to have this heard now, but I would  
4 just ask for some indulgence on getting into some issues that  
5 may have been in their brief that wasn't in their oral  
6 argument.

7           As an initial matter, the United States doesn't allow  
8 accused terrorists to decide what is in the best interests of  
9 the victims in this case. That was proffered as one of the  
10 reasons why the judge shouldn't vacate his severance order.  
11 That, sir, is the prosecution's job. We have made that case  
12 as strongly as I could have possibly made it to you last time,  
13 and it's the prosecution, not the accused -- and with all due  
14 respect, not the military judge -- but the prosecution that's  
15 uniquely situated to be able to make that assessment.

16           We have the burden at trial in the case-in-chief. We  
17 know what our case is going to look like. We know who the  
18 witnesses are, and we see every time we meet with the victims  
19 how emotionally affected they still are and how much they seek  
20 some modicum of justice and closure on this chapter of their  
21 life.

22           Having it done one time for all seems to be the best  
23 answer right now. It might not always be the case. The

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1 government isn't taking the position that in no way can it  
2 ever foresee a circumstance where this case should be severed,  
3 but what we are saying is now is not that time. Right now  
4 none of the accused have any substantial rights that are being  
5 prejudiced by this joint trial. The delays to date were all  
6 reasonable delays. And the government's position clearly in  
7 the Special Review Team's filings is that this can be resolved  
8 over the next couple of months.

9 I understand that defense may not share that view,  
10 but ultimately it's going to be up to the military judge to  
11 decide on the filings. The Special Review Team -- who is  
12 available, at some point will hopefully get to litigate  
13 aspects of 292 -- in their filing made it clear that with our  
14 evidence that we presented, that we believe that the military  
15 judge now does have enough information to make a determination  
16 that a conflict does not exist. If that's the case and a  
17 conflict doesn't currently exist, there may be no need for  
18 independent counsel. If there is no need for independent  
19 counsel, that can't be the separate basis by which you sever  
20 the case.

21 So the government's views here should be entitled to  
22 strong weight on what the most efficient way is to try this  
23 case. I think that's consistent with federal case law.

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1 That's why we asked that it be referred as a joint trial  
2 initially. That's why the convening authority referred it as  
3 a joint trial, and that's even why the courtroom was built  
4 which we are standing in today. The defense argument that  
5 Binalshibh's views somehow matters to this commission is,  
6 quite frankly, the most offensive thing to date that's come  
7 from that side of the room.

8           We believe the government has met its burden in  
9 establishing its grounds for reconsideration. This was a  
10 unique circumstance due to the nature of the military judge's  
11 order. And when it came out -- and in many ways this is a  
12 request for a first consideration of the prosecution's views  
13 on this specific issue in light of the fact that it was  
14 premised on facts regarding additional delay, that the  
15 prosecution felt did not accurately reflect certainly the  
16 prosecution's position regarding the 909 filing and in light  
17 of the new evidence that the SRT filed regarding the  
18 declaration that I just mentioned.

19           Under these circumstances, the prosecution believes  
20 it has met its burden for reconsideration. There were both  
21 new facts and it was a way to try to address what we believe  
22 is a manifest injustice in this case.

23           MJ [COL POHL]: As I understand the government's position

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1 is, you are not necessarily asking that the severance order be  
2 vacated, simply held in abeyance depending how things play  
3 out, and therefore would leave open for another day, for want  
4 of a better term, to reinstate the severance order? Is that  
5 kind of the government's position?

6 MDTC [MR. TRIVETT]: Certainly the military judge would  
7 have the authority to do that. If things were taking too  
8 long, you can always -- the relief we asked for specifically  
9 was to hold it in abeyance to try to get 292 resolved. So  
10 yes, that is the government's position.

11 MJ [COL POHL]: So if I understand it, it is hold it in  
12 abeyance with no final decision, which would then in effect  
13 put Mr. Binalshibh back with the other four until things  
14 developed down the road and then, if necessary, revisit the  
15 issue?

16 MDTC [MR. TRIVETT]: Yes, sir.

17 MJ [COL POHL]: Okay.

18 MDTC [MR. TRIVETT]: Yes, sir. And specifically, and  
19 Mr. Harrington raised this issue, and the judge rightly  
20 pointed out, at some point in time it may be taking too long  
21 for any one of the accused. The delays may turn from being  
22 reasonable to being unreasonable. The standard for severance  
23 is still the standard for severance, and we would hope that

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1 the judge in determining whether or not he wanted to  
2 reinstitute his order would look to the standard under Zafiro,  
3 would look to Richardson v. Marsh, and would find that there  
4 is some substantial right. Generally that's the burden of the  
5 defense.

6           Here, right -- as we sit right now as the severed  
7 case, even though Mr. Binalshibh has now not opposed your  
8 severance order, he still never had to carry his burden to  
9 sever. It's a very heavy burden under the law. We don't  
10 believe that he can make that burden, certainly not now. So  
11 the situation we find ourselves in is that down the line, if  
12 292 is taking an inordinately long amount of time, at some  
13 point I would think the judge would have to reach a conclusion  
14 that a substantial right of one of the accused was, in fact,  
15 being prejudiced. If, in fact, he did, then certainly the  
16 judge would have the discretion to reinstitute his order.

17           No one is saying that you didn't have the authority  
18 or the discretion to do the order that you did. We simply  
19 thought it was premised on things that we wanted to address  
20 because we didn't agree with how long things would take.

21           MJ [COL POHL]: One of the difficulties in your delay  
22 analysis is that it's a prospective analysis, but the delays  
23 are all retrospective. By that I mean is right now, as we

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1 discussed the other day, since December, because of issues  
2 with Mr. Binalshibh, the -- we have done nothing, arguably  
3 nothing until April.

4 MDTC [MR. TRIVETT]: Until April, yes, sir.

5 MJ [COL POHL]: And then from April forward, at least  
6 since July 24th, it's all been that one accused specific  
7 counsels -- I mean specific issue. I mean, looking back,  
8 there has been ten months.

9 MDTC [MR. TRIVETT]: Correct.

10 MJ [COL POHL]: Now you are looking forward, the  
11 government is indicating maybe we can resolve it this session  
12 or perhaps in October, but if we get to let's say January and  
13 it is still not resolved, are we going to look back, or are we  
14 going to look forward? Do you understand what I am saying?

15 When you say the delays, it's difficult to anticipate  
16 how long this will take to be resolved prospectively, and so  
17 therefore would we ever get to the point that it would be an  
18 unreasonable delay going forward?

19 MDTC [MR. TRIVETT]: Sure. I think we could get to that  
20 point, depending upon how the litigation ----

21 MJ [COL POHL]: Wouldn't I necessarily have to consider  
22 the delays to that point and then add that to what the  
23 prospective delays are ----

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1 MDTC [MR. TRIVETT]: Yes, sir.

2 MJ [COL POHL]: ---- as best we could glean?

3 MDTC [MR. TRIVETT]: Yes, sir, but in doing that it's the  
4 government's position that the time from December to April --  
5 if we are attributing time as far as reasonableness of one  
6 delay as to all accused in a joint trial, it's really only the  
7 time from December to April. Once April happens, once all  
8 five teams file 292, nothing is advancing at all, including  
9 Binalshibh's motion for a 909 hearing.

10 MJ [COL POHL]: Let me be clear, it was a government  
11 motion for a 909 hearing, wasn't it?

12 MDTC [MR. TRIVETT]: Yes. I said, I thought I said 909  
13 issue.

14 MJ [COL POHL]: I thought you said Mr. Binalshibh's motion  
15 for a 909.

16 MDTC [MR. TRIVETT]: If I did, I misspoke. It was the  
17 government's motion and we stand behind why we filed it.

18 MJ [COL POHL]: I don't want to get into a long discussion  
19 about whose delay it is, but you look backward for delays you  
20 know about and forward to delays you get. And there is going  
21 to be a certain amount of lack of fidelity for the foregoing  
22 delays.

23 MDTC [MR. TRIVETT]: Yes, sir, and that's conceded.

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1 MJ [COL POHL]: Okay.

2 MDTC [MR. TRIVETT]: But clearly from April to when you  
3 issued your order that only Mr. Binalshibh had the conflict --  
4 and my understanding is that there are other pending potential  
5 motions to reconsider based on positions in our motions that  
6 Mr. Connell has filed, and others, that the 292 issue may not  
7 be resolved, at least in the mind of the other four counsel,  
8 absent Mr. Hawsawi, who took the position that he is accepting  
9 your 292 ----

10 MJ [COL POHL]: I got it. Okay.

11 MDTC [MR. TRIVETT]: So in getting back to addressing the  
12 defense's brief, it's the prosecution's position that the  
13 accused's support for the severance order at this point does  
14 not change the military judge's legal analysis, or at least it  
15 should not. During oral argument on Monday you asked  
16 Mr. Harrington what the prejudice would be if his client were  
17 returned to the status quo ante, and he didn't have a good  
18 answer for you.

19 And then 48 hours just about elapsed and he was able  
20 to actually put down on paper his response to the government's  
21 motion to reconsider, and he still didn't have a good answer  
22 for you. And I posit that the reason he hasn't had a good  
23 answer for you on the prejudice his client would suffer is

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1 because there is no prejudice his client would suffer.

2           The discussion, whether it be in the brief or in his  
3 oral argument, regarding having issues that are unique to  
4 Ramzi Binalshibh is not a unique issue to any joint trial. It  
5 is not a unique issue to this joint trial. Ms. Bormann has  
6 filed several different motions about her own access to her  
7 own client or the conditions of her own workspaces that have  
8 nothing to do with the other four counsel. Mr. Connell hasn't  
9 been part of any of the litigation surrounding the MOU issue,  
10 which is unique now only to four of the five counsel.

11           These issues are going to happen in every joint trial  
12 everywhere in federal court. It's whether or not they are  
13 reasonable and whether or not they abrogate on a substantial  
14 right of one of the accused. And I would argue certainly for  
15 Ramzi Binalshibh, if he were filing the severance motion, he  
16 would have no capability of carrying his burden that he is  
17 going to have one of his rights prejudiced in any way. At  
18 most it would go to the other accused.

19           In addressing the other accused -- and I know that  
20 they are not here, and I am sure they will have an opportunity  
21 to argue at some point on a related issue in their case, we  
22 have to look at where they are at, especially regarding the  
23 MOU. We filed a motion and the judge has indicated that he

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1 wanted to handle whether or not they were going to sign the  
2 MOU.

3 I don't want to get into the whole argument on  
4 013III, but there is a potential if they refuse to sign the  
5 MOU, they are either going to be ordered to show cause as to  
6 why they should remain on the case, or they are going to be  
7 asked to withdraw. If that's the case, that can be a  
8 potential delay that far outweighs anything in 292. Until the  
9 resolution of that is worked, we are not certain what is going  
10 to delay longest. It could be that you, with all your good  
11 intentions, pull Ramzi Binalshibh out of the case because you  
12 think it would speed the case along, and yet this case may get  
13 finished far before theirs. There is no way to accurately  
14 predict it. We believe there are too many things up in the  
15 air regarding the litigation for severance to be proper at  
16 this time.

17 And, again, in regard to the prejudice, for all  
18 intents and purposes -- I don't want to say this was a gift to  
19 Ramzi Binalshibh, but he didn't have to earn it. He didn't  
20 carry the burden that he normally has to carry. There is  
21 nothing that would prevent him from doing it in the future.  
22 There is nothing that would prevent him, if he still believes  
23 all of these issues really are going to impact his rights that

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1 he can file a motion to sever. But he would have to carry the  
2 burden. It is still a drastic remedy.

3           There are a lot of less than drastic remedies that  
4 the military judge can take in order to continue to move this  
5 case along, one of which is you can have sessions in a joint  
6 trial aspect. If it is only going to touch on one of the  
7 accused or several but not all of the accused, the other  
8 accused can be absent if they so choose. There are ways to  
9 work around this situation so that we can move issues that  
10 only involve one counsel along without holding up everybody.

11           In federal court, it's the experience of trial  
12 counsel that sometimes even during the case-in-chief judges  
13 will allow certain defendants, if there will be no evidence  
14 presented that will inculcate them on a certain day, to be  
15 absent from entire days of court during the case-in-chief.  
16 That's the experience of AUSAs who have handled large-scale  
17 conspiracy cases, and that's when it's much larger than five  
18 people. So there are lots of creative remedies short of  
19 severance that I think would address the concerns that the  
20 military judge has that fall far short of severance.

21           An additional possible remedy in a regard to any 292  
22 issue to move it quickly along is to simply rule on the  
23 papers. A lot of these things, unless there is a factual

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1 dispute, there is no right to oral argument. The military  
2 judge has found that in certain rulings he made without oral  
3 argument. That's another way to expedite the process in order  
4 to resolve outstanding discovery issues or other disputes that  
5 may ultimately slow down a final resolution on 292, however  
6 that -- whatever that resolution may be.

7 MJ [COL POHL]: I shouldn't just ----

8 MDTC [MR. TRIVETT]: Yes, sir.

9 MJ [COL POHL]: I mean, if there are issues that need oral  
10 argument, they are going to get oral argument.

11 MDTC [MR. TRIVETT]: Yes, sir, understood.

12 MJ [COL POHL]: It is not simply because it takes time, it  
13 takes time. If the process takes time, it takes time.

14 MDTC [MR. TRIVETT]: Yes, sir.

15 MJ [COL POHL]: I understand what you are saying, but you  
16 seem to be implying that -- decide it without oral argument so  
17 it can move faster. Again, I always have a sense of urgency  
18 when a trial is going on, but the bottom line is the process  
19 must be followed. And if there is a reasonable basis for oral  
20 argument on any issue we will have it. And if the process  
21 takes time, it takes time.

22 MDTC [MR. TRIVETT]: Absolutely, sir. We know it has been  
23 the military judge's position with regard to certain motions

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1 that certain motions do not need oral argument in order to  
2 resolve.

3 MJ [COL POHL]: That's true.

4 MDTC [MR. TRIVETT]: Certainly to the extent that's a  
5 possibility depending upon 292 and the discovery requests  
6 attendant with 292, that's just simply one of the other  
7 remedies that we are recommending as something short of  
8 severance.

9 MJ [COL POHL]: Okay.

10 MDTC [MR. TRIVETT]: And I'll touch on 152 briefly only  
11 because Mr. Harrington touched on it. Ultimately that may be  
12 a very short hearing. Certainly based on our filings, we  
13 don't believe they are going to have any witnesses that are  
14 going to testify consistent with what their accused has said  
15 in the affidavits filed on 152. The reasons therefor are  
16 filed in all of the 909 related issues, including the exhibits  
17 that we filed. That issue shouldn't cause concern. The  
18 government has presented everything it intends to present on  
19 that issue, and I think the military judge recognized up front  
20 that it's impossible to parse the two out completely.

21 So even though the evidence was proffered as exhibits  
22 for -- in lieu of testimony for our 909 presentation, it would  
23 also be the same evidence that we are relying on for any 152

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1 argument. So I don't think that that would be as concerning  
2 to the military judge as Mr. Harrington made it out to be  
3 regarding how long that's going to take.

4           They will certainly have requests for discovery, but  
5 in the end, based on everyone certainly that we have spoke to,  
6 some of which we have presented evidence on, they are not  
7 going to find anyone who says what is happening is happening.  
8 That's been our position since the beginning. That hasn't  
9 changed. They are certainly entitled to try to make their  
10 record. I am not suggesting otherwise. But in the end, there  
11 is just not going to be a whole lot of testimony at the end  
12 that's going to say what Mr. Binalshibh says because it's the  
13 government's position that it's not happening. It wasn't  
14 happening when it was first alleged, it's not happening now.  
15 The camp is under a judge's order on that issue. We  
16 communicated that judge's order. They take that order very  
17 seriously.

18           I just raised it because they raised it. We don't  
19 believe that's going to be a lengthy process regardless of  
20 whether it's tied to a 909 or a separate 152 hearing. It is  
21 what it is, and the government's position is they are not  
22 going to be able to do much with that because it is just not  
23 happening.

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1           So nothing in the filing, sir, should change your  
2 analysis on whether to vacate or at least, at a minimum, hold  
3 in abeyance your severance order until 292 is resolved. At  
4 some point in the future we can look to see whether those  
5 issues related to Ramzi Binalshibh have been resolved at that  
6 time, and if so, we would not have suffered and the government  
7 would not have been prejudiced by a severance at this point in  
8 time. If not in the future. If, in fact, it is going to be  
9 an unreasonable amount of time and somehow some of the other  
10 accuseds' rights are starting to be abrogated based on those  
11 delays, at that point in time it may be appropriate, but it is  
12 certainly, in the prosecution's mind, not appropriate now.  
13 Thank you.

14           MJ [COL POHL]: Thank you.

15           Mr. Harrington, anything further?

16           LDC [MR. HARRINGTON]: Judge, specifically lacking in  
17 Mr. Trivett's response is the procedural argument and why it  
18 is that the court should even reconsider in this case, and we  
19 don't believe that they have met their burden of showing a  
20 manifest injustice, and we also believe that the court has  
21 addressed the concerns that he has in the order that you  
22 signed.

23           And he makes reference to the fact that we have not

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1 articulated prejudice to Mr. Binalshibh in seeking a  
2 severance, and we did not have a cross-motion or a motion for  
3 a severance ourselves. Our filing was in direct response to  
4 the court's question the other day that Mr. Binalshibh was not  
5 opposing the court's order. If we were to file a separate  
6 motion for a severance, we would have done so.

7           Also lacking in Mr. Trivett's response is the fact  
8 that the court has the authority to do what the court did, and  
9 the court has the authority to look at prejudice to everybody  
10 involved in this case and not necessarily just to  
11 Mr. Binalshibh, and obviously the prejudice you refer to in  
12 your order goes to the other co-accused rather than to  
13 Mr. Binalshibh.

14           Judge, Mr. Trivett made reference to the fact that we  
15 mentioned the victims' families in our response. And while  
16 the prosecution may well advocate for the victims' families,  
17 and in the penalty phase of this case there is no question  
18 about the fact that they will advocate on behalf of certain of  
19 the victims' families and we recognize that, but it also  
20 doesn't mean that that issue is sacrosanct and that we can't  
21 mention it or say something about it.

22           And the only reference in our response was the fact  
23 that the government continually complains about delay and how

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1 hard it is on the victims' families, and we understand that.  
2 We recognize that, Judge. And our only reference was to the  
3 fact that the solution that you proposed may well have an  
4 alternative way to provide some relief for that. That's all  
5 we did. We didn't say it was 100 percent accurate or anything  
6 else. We didn't file it to insult anybody or to hurt anybody,  
7 and I think it's inappropriate for him to make that  
8 characterization.

9           Judge, I think you hit on it when you asked him the  
10 questions about the fact that the past ten months have been a  
11 delay in this case, and it's all attributable to our client in  
12 one way or another. And I am not saying it's our client's  
13 fault, but I am saying they are all issues that relate to him.  
14 And this notion that this conflict issue is a simple one, as I  
15 said before, is just not accurate, Judge.

16           And Mr. Trivett just raised the issue of what happens  
17 if we have this MOU and defense counsel won't sign it and then  
18 we have to get new counsel through one procedure or another.  
19 You are looking at the end of this, assuming that you continue  
20 with conflict counsel, conflict counsel looks into it,  
21 conflict counsel will talk to the lawyers on Mr. Binalshibh's  
22 team, and I can represent to you that there are issues here  
23 which the conflict counsel needs to know about and needs to

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1 talk to Mr. Binalshibh about. And we hope that we get the  
2 discovery that we need so that counsel can do their full job,  
3 we hope we can get it so we can do our full job.

4 But if we don't get that, you are going to be at the  
5 end where you're going to be hanging with an incomplete record  
6 on the conflict of counsel and we will file declarations by  
7 our team to the court which demonstrate that and will  
8 guarantee you there had been a hanging issue. And if we get  
9 the information -- if, as the Special Review Team says, there  
10 is no issue, why don't they give us the information? Maybe we  
11 would agree with them. But they won't agree to turn it over.  
12 But we will deal with that with the other team.

13 But at the end of the day, if there is a potential  
14 conflict or a real conflict for me or any of the other  
15 attorneys on my team or any of the other members on our team,  
16 Mr. Binalshibh will have to waive that conflict. And if he  
17 doesn't waive that conflict, it's going to be the same  
18 scenario that Mr. Trivett talked about. If he doesn't waive  
19 it with me, then I am out of the case, and it means that you  
20 have to start all over again with getting learned counsel. If  
21 he doesn't waive it with the other detailed counsel, we are  
22 going to have to go through the process of getting additional  
23 detailed counsel. And especially if you have to get new

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1 learned counsel, Judge, it's going to be a substantial delay.

2 MJ [COL POHL]: Mr. Harrington, there are two other  
3 accused who are raising 292 issues also.

4 LDC [MR. HARRINGTON]: I understand.

5 MJ [COL POHL]: So if I -- I mean, Mr. Trivett's comment  
6 that, okay, we address delays or what time it takes to resolve  
7 Mr. Binalshibh's unique issues does not necessarily mean there  
8 will not be time taken, for example, for Mr. Khalid Shaikh  
9 Mohammad's unique issue or Ms. Bormann -- Mr. Bin'Attash's  
10 unique issues.

11 So couldn't that -- I mean, there is going to be --  
12 with five accused, there is going to be unique issues up and  
13 down. And unless we divide it into five separate trials, by  
14 definition it's going to slow down the other four to a degree.  
15 True?

16 LDC [MR. HARRINGTON]: Yes, but, I mean, in this  
17 particular case, with all due respect to the other attorneys  
18 who are accused of raising 292 issues, you know that you have  
19 a specific one here, one that was enough that originally you  
20 appointed conflict counsel, and then after reflections you did  
21 it again. And so you know that with respect to Mr. Binalshibh  
22 that it's a long and it's a difficult situation.

23 And I don't know what the situation is with the other

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1 counsel, but we know in this particular case that with respect  
2 to him, it is a very difficult issue, it's a complex issue,  
3 and it's a very lengthy one.

4 May I have a moment, Judge?

5 MJ [COL POHL]: Sure.

6 LDC [MR. HARRINGTON]: Judge, Mr. Trivett responded to my  
7 comments about the 152 issue, and we fundamentally disagree  
8 with him that that's a simple issue. First of all, he also  
9 said that the filing that they had on the 909 issue,  
10 declarations after the fact, after you had said we are moving  
11 ahead, defense doesn't say he is incompetent, the prosecution  
12 doesn't say he is incompetent, there is a presumption in the  
13 statute, they still filed declarations with you for people  
14 that they were going to call in the 909 evidentiary hearing.

15 And now he says, oh, that's also for the 152 hearing,  
16 which only supports the idea that it is our belief that the  
17 909 really was a subterfuge to defend against the 152 issue.  
18 But this case is complicated enough, but you made an order one  
19 day, Judge, in the court and said I understand you say you are  
20 not doing what it is, I am directing you not to do that.

21 MJ [COL POHL]: Right.

22 LDC [MR. HARRINGTON]: And you will hear in the 152  
23 hearing that there are instances where Mr. Binalshibh has said

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1 to guards, said there is an order that tells you not to do  
2 this and they respond we are not doing it. We don't know what  
3 the judge has ordered. We have never seen the judge's order.  
4 And they laugh at him like there is no order.

5 Judge, that's not an easy issue, and it's all going  
6 to be intertwined. And I'm representing to the court that  
7 it's going to be a very difficult issue unique to him, and,  
8 again, is going to separate him out from the others.

9 MJ [COL POHL]: Just on 152, and that's -- although the  
10 government -- some of the parties seem to be mixing the 909  
11 issue with the 152 issue. Be that as it may, the defense has  
12 a motion for witnesses on 152, correct?

13 LDC [MR. HARRINGTON]: Yes, Judge.

14 MJ [COL POHL]: And it seems to me that if you have got  
15 evidence to present, I'll review the issues and we just need  
16 to resolve it. The government position is nothing is  
17 happening. You want to present evidence that something is  
18 happening. And so we will get to that as quickly as we can  
19 with the understanding that I don't necessarily agree that  
20 those are mixed issues. Because the complaint, as I get it,  
21 is a complaint about physical and audio disturbances that are  
22 actually occurring, and you give evidence that they are  
23 actually occurring, that's one thing. But that's --

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1 understand, the 152 needs to be resolved, and it needs to be  
2 resolved as quickly as possible, and I think the starting  
3 point will be as I review your discovery requests, the burden  
4 on that one is on you. If you want to present evidence in  
5 whatever way, shape of it, that's fine. But we are going to  
6 get to that, Mr. Harrington, is what I am trying to tell you.

7 LDC [MR. HARRINGTON]: I think the proper  
8 characterization, rather than lumping the two issues together,  
9 is there may be some overlap of witnesses. A witness may be a  
10 witness to both issues.

11 MJ [COL POHL]: True. But I am saying if we approach it  
12 as a 152 issue, being a 152 motion from you, how the  
13 government chooses to present evidence on their side is up to  
14 them.

15 LDC [MR. HARRINGTON]: Right.

16 MJ [COL POHL]: Whether it's relevant evidence to your  
17 motion as opposed to their 909 issue, that would be their  
18 burden to show it's relevant to 152 or somehow that the 909  
19 issue is somehow relevant to 152. I am not ruling or anything  
20 on that. I am simply saying this has been out there for a lot  
21 longer than it probably should have been, and there is time to  
22 take evidence on it, if there is any, and resolve the issue.

23 Be that as it may, that's kind of a side issue, but

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1 you mentioned 152, and I wanted to let you know I certainly  
2 have not forgot about it and I intend to try to get it  
3 resolved, and I say this with all understanding of how long  
4 things take, but as quickly as we can get to it.

5 LDC [MR. HARRINGTON]: Right. I have nothing further,  
6 Judge.

7 MJ [COL POHL]: Thank you. The commission has been  
8 concerned about the pace of play, for want of a better term,  
9 from the initial start. It was concerned that the fact that  
10 we had five separate accused could result in protracted  
11 litigation and that's why over two years ago the commission  
12 issued a show-cause order to the government of why -- to show  
13 why this case should or should not be severed. I considered  
14 the response and kept the case together.

15 Subsequently we have had some delays in this case,  
16 which resulted in the commission -- given the status of 292,  
17 felt that another show-cause order would have been  
18 inappropriate procedurally, and, therefore, issued its order  
19 severing Mr. Binalshibh.

20 The commission understood it did this without the  
21 input from either party and, therefore, understood that there  
22 is a very good chance it would get input from both parties.  
23 The commission has considered the input from both parties, has

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1 spent time on this issue, has thought about it extensively.

2 I will subsequently issue a written order, but, for  
3 now, the government request for reconsideration of the  
4 severance order is granted. The government request that the  
5 severance order be held in abeyance is also granted. That  
6 means tomorrow at 0900 Mr. Binalshibh will join the other  
7 four, and we will pick up with 292 with all five accused  
8 present. As I said, there will be a written order  
9 memorializing what I just said issued, hopefully by close of  
10 business today, but as quickly as I can get to it.

11 Any questions about the court's order?

12 MDTC [MR. TRIVETT]: Not from the government, sir.

13 MJ [COL POHL]: Mr. Harrington?

14 LDC [MR. HARRINGTON]: No, sir.

15 MJ [COL POHL]: The commission is in recess.

16 [The R.M.C. 803 session recessed at 1443, 13 August 2014.]

17 [END OF PAGE]

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